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No. 709

In the

Supreme Court of the United States

OCTOBER TERM, 1965

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, Deceased,

Petitioner,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,

Respondents.

No. 733

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

In the Matter of the Petition of H. Leslie Atlass for Exoneration from or Limitation of Liability as the Owner of a Certain Vessel known as the Yacht SIS

MOLLIE DARR, Administratrix of the Estate of Kurt Darr, Deceased,

Petitioner,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,

Respondents.

REPLY TO PETITIONS FOR CERTIORARI

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Petitioners have allowed controversial zeal to carry them into extravagant and unwarranted assertion and assumption.

Some of this is corrected in the Reply to Petition for Rehearing filed by these Respondents in the court below (to which the reader is respectfully referred in order to avoid repetition here).

In what follows we shall try as briefly as possible to correct the rest, hoping that in the end we shall not have overlooked possible misapprehensions that the Petitions are designed to stimulate. In the end, their "Questions Presented" do not arise.

The leading facts are not complicated. They are not disputed any more. Two men got drunk, one of them so helplessly drunk that he could not stand up if he were not held up whether it was noon or midnight. He fell, first in the street when two men were trying to hold him up, and a few minutes later off a shipyard's dock; whereupon the other intoxicated man (then the only one trying to hold him up), jumped in after him because, as the trial court observed, he also was drunk, and both drowned.

Their estates sued by the same counsel who appear here, who waived trial by jury of the issue here involved. (PA 6-7)[1]

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[1] When it becomes pertinent to make abbreviated references (as here, for example, to correct counsel's insinuations that the right of jury trial is somehow involved) they are as follows:

Op: The Opinion of the Court of Appeals (Appendix A hereof)

FF: Findings of Fact by the trial court (Appendix B hereof)

A: Appendix printed by Petitioners Muth and Darr in the Court of Appeals

PA: Appendix printed by these Respondents, Harriet M. Atlass and Chicago Title & Trust Company in the Court of Appeals

They are Petitioners here; they were *Appellants* below, *attacking* Findings of Fact made by the trial court.

The trial court found that in the small hours of the morning of October 26, 1956, in Detroit, Michigan, one of these deceased "seamen"[2] (Muth) fell in and the other (Darr) jumped in off the shipyard's dock, 15 feet from the north end of a dock walkway, which had become "obstructed" by "debris and other obstacles"—"considering" which the lighting "at the time of the drownings was insufficient;" that the owner of the vessel on the rail-bed in the shipyard (Mr. Atlass, the Respondents' decedent) who was in Chicago was not responsible for the hazardous condition of the walkway as it existed at the time of the drowning; that the intoxication of Muth and Darr made them "partly responsible" for their deaths inasmuch as they knew all existing conditions when they were getting themselves intoxicated.

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[1] (Continued)

Other abbreviated references:

PD: Petition of Darr

PM: Petition of Muth

P. Rhg: The Petitioners' joint Petition for Rehearing in the Court of Appeals

R.P. Rhg: Respondents' Reply thereto

[2] The Court of Appeals did not disturb Findings of the trial court that Muth and Darr were, respectively, a painter (the president of his union) and an electrician, both long-time employees of CBS and still in its employ (FF 3 and 5) while going with Mr. Atlass, an executive of that company and owner of the yacht SIS on a voyage that started out for Florida (FF 7), and thus *pro tempore* "seamen" (FF 11, 12).

The reference of the Darr Petition to "well known propensity of seamen for partaking of alcoholic beverages" (PD 2) is artificially conceptual; its statement (PD 9) that the Court of Appeals disturbed these findings (held "That Darr was not a seaman") is untrue (it remarked

Petitioners, as Appellants below, attacked the trial court's findings of fact that inculpated the deceased Muth and Darr and acquitted Mr. Atlass personally.

The Court of Appeals, however, examined the Findings of Fact made by the trial court with scrupulous care, as its opinion shows, and upheld the Findings Petitioners attacked. Petitioners are, therefore, confronted here with concurrent findings below that Mr. Atlass, personally, was not responsible for any causative hazard of the walkway as it existed at the time of the drownings, and that intoxication of Muth and Darr was a proximate cause of their deaths. *Graver Tank Mfg. Co.* v. *Linde,* 336 U.S. 271, 275 (1948).

The Petition of Darr wholly ignores the concurrent finding that acquits Mr. Atlass personally. (Petition of Darr, *passim*) The Petition of Muth attacks it with a curious argument, hinted at but not explained until it comes to a discussion of matters on which the Petition, admittedly, is not based (PM 3). It then argues that the trial court meant only that Mr. Atlass was not negligent enough to be charged with "privity and knowledge" under the Limitation Act (PM 18).

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[2] (Continued)
that it is a far-fetched idea that they were in the course of their employment as seamen when they were getting drunk in a bar and returning to the yacht one in a drunken stupor and the other badly intoxicated—Op. 9a; see R.P.Rhg. 6, 7) and the fact is that the painter and electrician got drunk (Op. 6a-7a) whereas Smith, the regular seaman (FF 7) who was with them (Op. 7a) did not (A. 52, 36, 40). "A little recreational drinking" is one thing (Op. 7a, 8a); bad intoxication and stuporous drunkenness is a classic example of the gross misconduct that violates a seaman's duty to his employment (Op. 7a); *The SS Berwindglen,* 88 F. 2d 125 (CA 1) and many other cases.

That is not what the trial court said in its Finding (which we suppose is to be respected as its considered statement of what it found on the facts). (Op. 13a, 17a). It is not what the trial court said on another occasion at Petitioners' Appendix page 61, to which the Petition refers in this connection, where the trial court said:

> "Negligence *in Jones Act cases* has to be something more positive, more direct, and more proximate, in my judgment, than Mr. Atlass in Chicago at the time when an accident occurs." (A. 61) (Our emphasis)

It is not privity and knowledge under the Limitation Act that the trial court speaks of here, but causative negligence under the Jones Act; and it then acquitted Mr. Atlass "personally" (FF 41).

The Petition of Muth, in a footnote at page 19, resorts to the assertion that the trial court did not mean what it said here, either. Contrary to Petitioner's assertion, the fact that the trial court's judgment visited Jones Act liability on Mr. Atlass obviously does not mean that it was for any *personal* negligence of his; the trial court made it very plain that it was not. (*Ubi supra*)

The Petition of Muth then asserts that the trial court was "confused" and "admitted its confusion." Nothing the trial court said in its finding nor its statement manifests the "confusion" of which it is accused. (It is the *Petition* that attempts to create an irrelevant "confusion" by out-of-context reference to Respondents' brief in the Court of Appeals.) The trial court, on the contrary, made it clear that, if Mr. Atlass *personally* were guilty of any causative negligence (whether of omission or commission) he could not have limitation of liability, saying:

> "I have determined that Mr. Atlass was not personally negligent in that nothing he did or failed to do was a proximate cause of the death of these gentlemen, and therefore the principle of limitation of liability is applicable." (A. 60)

It is difficult to see how the trial court could have made it any more plain on this record that it acquitted Mr. Atlass personally of any causative negligence whether of omission or commission; it did *not find* that when he was there the walkway was "obstructed" (by "timbers," "planks," "debris" or "other obstacles").[3] It did *not find* that *in the absence* of such "obstructions" of the walkway the lighting of the walkway was insufficient for sober, able-bodied adults merely walking there; the trial court did *not find* that the "staggering" Muth (FF 31) was *attempting to step across the gap* to the rail bed.[4] It found that the staggering Muth "fell" when he got only 15 feet from the north end of the walkway and "went down" there, with only the intoxicated Darr to hold him

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[3] It found that Mr. Atlass left Detroit for Chicago on the 24th (FF 19) and that it was shortly after 2:00 A. M. on the 26th when Muth and Darr left the tavern (FF 28). It stated:

> "* * * I am satisfied that an absent shipowner, who, on this record, never saw the conditions at midnight or 2:00 o'clock in the morning, who I think could not reasonably be held to have known that there were conditions which were less than adequate for safe ingress and egress, is not personally liable." (A. 60)

As to imputed negligence of Mr. Atlass's servants (as mentioned below) the Court of Appeals presently points out that there was no obstruction by debris or other obstacles that interfered with Muth or Darr as they proceeded down the walkway on the later occasion, either. (Op. 13a, 14a)

[4] "There was no proof that Muth was attempting to cross the gap at that unusual point." (Op. 6a)

up (FF 30, 31) and that Muth had already "fallen" and "gone down" a few minutes before in the street when *both* Darr and Smith were trying to hold him up. (FF 29)

The trial court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings." (FF 41)

These findings were made by *the trial court* pursuant to the trial court's announcement after the conclusion of all the evidence, as above quoted, that it had "determined that Mr. Atlass was not personally negligent in that nothing he did or failed to do was a proximate cause of the deaths of these gentlemen," etc. (*Ubi supra*)

On their joint Petition for Rehearing to the Court of Appeals Petitioners' argument was expressly, what it implicitly and in fact is here, namely: that a trial judge "could" infer something that would convict Mr. Atlass of causative negligence (P. Rhg. 3). But *that* is the question when an appellate court inquires whether the general verdict of a jury can be sustained. (Petitioners rely on many such cases here.) Petitioners waived trial by jury. (PA 6) It is very familiar that when trial is by the court, it is required to state its Findings of Fact (and to state them separately).[5]

The question before the reviewing court then is not what it "could have" found.

The whole thrust of assertion and insinuation (and elision) in the Petitions is that the trial court did not make Findings of Fact that it *did* make, and that it made

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[5] F.R.C.P. 52; Admiralty Rule 46½.

Findings of Fact *that it did not make,* as just pointed out. Upon that false base they erect a *non-sequitur* that the Court of Appeals held things that *it did not hold.*

The Petitioners failed to show that the trial court's finding acquitting Mr. Atlass personally of causative negligence was "clearly erroneous" on this evidence, which (as the Opinion points out (Op. 6a) *and the Petitions nowhere deny* (Petitions, *passim*) is undisputed as to the fact that this walkway was used by Muth and Darr themselves and everybody else, including women in skirts (Op. 15a; PA 74, 46-47, 121), by day and by night without any trouble (Op. 6a, 14a-15a) and had been for many years (Op. 15a) if only they were sober, as Muth and Darr certainly were not (Op. 7a). That cogent evidence alone supported the trial court's acquittal of Mr. Atlass personally as to permanent conditions at the shipyard.[6] And there is much more, as the opinion points out.

Just as the Appellate Court regarded what the trial court *did* (and did *not*) find, so also it regarded, as was equally its duty, all pertinent facts insofar as shown by overwhelming proof in the record. When these put findings of the trial court in true perspective it refers to that record. In such instances the Petitions complain that the Appellate Court had no right to look at it. They cite no decision of this Court that so holds. To the best of our knowledge this Court has never so held.

Thus, both courts below found that the staggering Muth fell off the dock because he was drunk and both found that the intoxicated Darr (who failed to hold the even

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[6] *Chicago, G. W. Ry. Co.* v. *Minneapolis, St. P. & S.S.M. Ry. Co.*, 176 Fed. 237, 242 (CA 8, 1910); *Inman* v. *B. & O. Ry. Co.*, 361 U. S. 138, 141 (1959); *Mercer* v. *N. Y. Trap Rock Corp.*, 91 F. Supp. 434, 438 (D.C. N.Y. 1950).

more intoxicated Muth up) then deliberately jumped in after him, when neither man was in condition to help himself or the other, because he was drunk.[1] Rational consideration of the real reason for the occurrence would seem to begin with the degree of their intoxication. The Appellate Court vigorously corrected the trial court's "tepid" finding "as to the degree of their intoxication." (Op. 7a) The Petitions which labor, by insinuation and by incorrect and elided statement, to create a mirage of non-existent differences between the Findings of Fact actually made by the courts below, significantly ignore this actual difference, except to *concede* the correctness of the *Appellate* Court's view of the fact.

The Petition of Darr concedes: "Muth apparently became helplessly [sic] intoxicated" (PD 5) and then discreetly passes over the intoxication of Darr—apparently forgetting that the intoxicated Darr deliberately jumped in and only when the intoxicated Muth fell in (FF 31); and that what is attributable to Muth's admittedly helpless intoxication is no more chargeable to these Respondents than Darr's own intoxication. The Petition of Muth concedes: "Muth was admittedly [sic] in a helpless [sic] condition when he left the tavern." (PM 16) (It was not the trial court, but the Appellate Court—in considering the reason for the occurrence—that found Muth was "helpless" (Op. 7a). The Petitions both concede as just quoted that *the Appellate* Court's statement of the fact is correct.) Muth had to be practically carried; he was so drunk he had to be held up (A. 57).

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[1] Both men could swim (FF 6). A few strokes would have carried them inshore to where the water was only 3 or 4 feet deep (FF 26). In their condition neither could so much as stay afloat, or even avail of immediately proffered rescue. (Op. 16a)

As to *why* Muth was helpless, the Petition of Muth (in a statement calculated to obscure the above difference between the findings of the courts below as to the *fact* that Muth *was* "helpless") now says it reluctantly "accepts" it as "conclusive" that: "Both [sic] courts below found this helpless [sic] condition was brought about by Muth's excessive drinking of intoxicating liquors" (PM 16). In a footnote thereto the Petition of Muth says that "the finding is even more difficult to accept as to Darr as no one but the waitress gave any testimony that he was drunk."

"The waitress" (who first saw the pair, with Smith, just after they left the tavern) did, indeed, testify that Darr was drunk and in a staggering condition (A. 36). She also saw Darr fail to keep Muth from falling off the sidewalk into the street *even with Smith's help, at that time.* (A. 36, 57-58) She also saw that Smith was not drunk, (A. 36) as others confirmed (A. 45, 46) and saw the three start off in the direction of the shipyard with Smith in the middle and the weight of the two staggering drunks on his shoulders (A. 37, 43).

In corrective comment on the trial court's "tepid" finding (that the drinking of Muth and Darr was a proximate cause) the Court of Appeals said:

> "This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other." (Op. 7a)

As mentioned, the Petitions do not now challenge this.[8]

When Smith, Darr and Muth arrived at the shipyard the doors proved too narrow for three abreast (PA 180). The staggering, near-helpless Darr now attempted to take charge of the stuporous, helpless Muth who had to be held up. (Op. 6a)

It is in the context of what now occurred that the full significance of the Appellate Court's conceded correction of the findings "as to the degree of their intoxication" appears. The staggering intoxicated Darr now attempted to hold up the *helpless, stuporous* Muth alone, and on his right. They could have gone straight ahead from the dock house to the place at the head or north end of the rail bed (itself 34 feet wide), where it abutted the dock with no gaps for a width of ten feet, and so had access to the rail bed by this "inshore route." (Op. 6a, FF 26) Instead, they turned left and headed down the walkway. (Op. 6a) They only got 15 feet from the door of the walkway when the staggering, helpless, stuporous Muth fell again, this time from the grasp of the staggering, intoxicated Darr alone, and this time off the dock. (Op. 6a-7a, FF 31)

Confronted with this, the Petitions abruptly diverge; the Petition of Darr ignores that the inshore route could be used. (PD, *passim*)

The finding (it is quoted by the Opinion, pp. 12a-13a) refers to "scaffolding." The further finding (quoted in the Opinion, pp. 12a-13a) says the walkway route was the one "most frequently" taken. Aware of this, the Muth

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[8] In their joint Petition to the Court of Appeals for Rehearing Petitioners finally conceded:

> "Muth was helpless and, as this Court infers, *in a stupor*." (P. Rhg. 10) (Our emphasis)

Petition refers to part of the evidence that the inshore route where there was no gap (FF 26) was used, specifically to the statement of a witness that it would be taken when something heavy was being carried (PM 10)—to which, understandably, the Darr Petition does not wish to call attention—and ignoring the uncontradicted statement of the same witness that the "scaffolding" did not interfere with its use (PA 130), as well as the statements of Petitioner's witnesses Wasilas and Mendel that the inshore route was used, and used by Muth and Darr (PA 46-47) by day and night (PA 74), and the statements of the other witnesses who testified on the regular use of the inshore route (PA 120; 184-185).

The significance of the now-conceded correction made by the Court of Appeals of the tepid finding of the trial court "as to the degree of their intoxication" is ignored by both the Petitions. It would seem apparent in the context of the situation. Muth was indeed staggering (FF 29). He was also in a *helpless,* drunken *stupor* as Petitioners finally admitted in their Petition for Rehearing (Note 8, *supra*) unable to stand anywhere without falling. That correction by the Court of Appeals of the trial court's statement of the predicate of the whole situation is not a disregard of the *McAllister* or *Guzman* cases (*McAllister* v. *U.S.,* 348 U.S. 19; *Guzman* v. *Pichivillo,* 369 U.S. 698) as Petitioners assert (PM 2, 13; PD 10) if only because it is no longer contested (*ubi supra*). The Petitions are merely fictional when they try to isolate the trial court's other findings from that critical and conceded change made in the trial court's findings to conform to the realities, and pretend that any decision of this Court forbids a Court of Appeals from making an *admittedly correct change* in the factual situation a basis for *a difference in result.*

This was not the only such basis.

The trial court found that the staggering Muth (actually, by admission, the *helpless, stuperous* Muth) "fell" (for the second time) when he and the intoxicated Darr got only *15 feet from the door at the north end of the walkway.* (FF 31, Op. 6a, 14a) It also referred to "obstructions" of the walkway. Accordingly, the Court of Appeals searched the record. Neither Petition brings forward anything in the record to the contrary of the Appellate Court's statement thereof:

> "That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support. The only testimony we find in this respect is that there were some planks on that walkway, and the photographs offered by claimants show that they were piled in order in their usual place on the east side of the walkway, against the wall of the boat shed. These planks were a part of the facilities furnished by the shipyard company for use by seamen if needed in bridging the gap between the walkway and the rail bed. They were never used by any of petitioner's seamen, including Muth and Darr, because their use was not thought necessary. In any event, the presence of these planks bore no relation to the occurrence. Muth and Darr made no attempt to return to the ship along the north side of the rail bed where there was no gap. When they left the boat shed accompanied by Smith, they turned left and proceeded south along the walkway, headed for the point across the gap from the ladder. As the Court found, this was the route most frequently taken from shore to the rail bed. There is no proof and no claim that there was any obstacle on the walkway which inter-

> fered in any manner with Muth and Darr as they proceeded along the walk on the east side of the gap." (Op. 13a-14a)*

It was "considering" debris and other obstructions on the walkway that a totality of conditions arose in which the trial court found the lighting insufficient (Op. 13a). Again the Petitions are merely fictional in trying to isolate the findings of the trial court from the critical corrections made by the Court of Appeals in the factual situation, corrections which Petitioners bring forward nothing in the record to contest. On the actual record there was no debris (PA 136-137) nor any obstacle (*ubi supra*) on the walkway which interfered in any manner with Muth and Darr as they proceeded along the walk to require more lighting where the admittedly helpless Muth in his drunken stupor fell for the second time. The Court of Appeals points this out, as above quoted. Neither Petition refers to *one word* in the record to the contrary. (Petitions, *passim*)

Here again the Petitions are merely fictional when they pretend that *McAllister* or any other case forbids a change in result based on uncontested corrections by the Court of Appeals in the factual situation portrayed by the lower court's findings; and especially so when there is no *finding* below that is thereby contradicted.

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*The Petition of Muth (PM 11) refers to a "power line" although neither court below does and there is no proof or claim that it was where Muth fell, 15 feet from the north end of the walkway (PM *passim*) any more than the planks referred to by the Court of Appeals. Parenthetically, Petitioners stipulated at the trial that the planks on the walkway were located as shown in the photographs mentioned by the Court of Appeals, which is not where both courts found Muth "fell," 15 feet from the door at the north end of the walkway. (FF 31; Op. 6a)

> "The [trial] Court made no finding that insufficient lighting of the walkway was due to the negligence of Atlass or any of his employees or that it was the cause, in whole or in part, for the fatal occurrence." (Op. 15a)

When the Petitioners argue that, on the predicate of the situation portrayed in the trial court's findings it could have drawn such an inference (although it made no such finding) they overlook that the predicate on which they argue that such an inference could have been drawn is critically changed and that they are unable to contest the change.

In the real (and now conceded) factual situation Muth was a staggering, helpless, stuporous, falling-down drunk who could not stay on his feet anywhere and the walkway where he again fell was clear there of debris or obstruction to interfere with the progress of the staggering, *helpless* drunk in his intoxicated *stupor* and his staggering, intoxicated companion. The trial court did not "infer" that poor lighting caused Muth to fall (again) on that predicate. Indeed, even on its own predicate, the trial court was unwilling to find as a fact that the lighting caused him to fall, in whole or in part. (*Ubi supra*) In that situation Petitioners suggest no decision of this Court that would require the Court of Appeals so to find. It is familiar that it is not the function of this Supreme Court to supply findings of fact that have not been made below.

The Muth Petition says there was no "usual" or "indicated" place, when one used the walkway route, for stepping across the gap (PM 10). The witnesses said that the place they regularly *did* step across when they took the walkway route was at the vessel's gangway lad-

der (which they had to use). (Op. 14a; PA 22-23, 42-43, 48, 60) [10] The location of the gangway ladder thus proved, in fact, a sufficient "indication" for everyone who testified as to the manner of using the walkway route. But over and above that, the rail bed abutted the dock with no gap, by the inshore route. (FF 26; Op. 5a) That would seem to be the "indicated" place for going onto the rail bed "with something heavy," such as a "helpless" drunk who had to be practically "carried."

Petitioners on Petition for Rehearing in the Court of Appeals reversed their field, conceding that Muth was in a *stupor* (P. Rhg. 10), but arguing that even stuporous intoxication was not the proximate cause, citing *McDonough* v. *Buckeye S. S. Co.*, 103 F. Supp. 473, aff'd. 200 F. 2d 558 (CA 6). As pointed out in the Reply to Petition for Rehearing filed by these Respondents, the Opinion of the Court of Appeals had answered that. (Op. 10a-11a; R. P. Rhg. 2)

The distinguishing basis of *The Buckeye* was: "There, the shipowner knew that was a regular procedure on his ship for a seaman to get drunk ashore and to be brought back to his ship by others of his crew and, with that knowledge, the owner had acquiesced in the practice" and even instructed his other employees with respect thereto, one of whom negligently abandoned a helplessly drunken seaman on a narrow catwalk from which he fell (Op. 10a-11a)—all as pointed out in *Robinson* v. *Northeastern SS Corp.*, 228 F. 2d 679 (CA 2); cert. den. 351 U. S. 947.

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[10] The Muth Petition refers to colloquy in which the court said they could [sic] have crossed elsewhere (PM 10). We suppose that what is "usual" is what was, not what could have been, done.

Petitioners' argument of desperation on the legal doctrine of the "intervening cause" *that bears the whole responsibility* overlooks that, on the facts here, that doctrine operates against Petitioners themselves. As the trial court found, they knew all about the conditions at the water front, whatever they were, when they were getting themselves drunk (FF 40) and unlike the facts of *The Buckeye,* their employer had given them no reason to expect that his other employees would look after them when they got drunk (Op. 10a-11a) [11]

As for Mr. Atlass' other employees, Johnson and Smith, Johnson did not even know they were drunk (Op. 10a). Smith was not hired by Mr. Atlass to put drunks to bed (Op. 10a). Like anyone voluntarily undertaking a humanitarian act he assumed, for himself, an obligation to carry it out with ordinary care; Smith did not charge his employer with any negligence of his in that behalf, whether of omission or commission, because it was not within the scope of his employment (Op. 10a). This involved no conflict with the Sixth Circuit's decision in *The Buckeye,* as pointed out in the Opinion (Op. 10a) and as had already been pointed out by the Second Circuit in *Robinson* v. *Northeastern Steamship Corp.,* 228 F. 2d 679 (CA 2) which was followed here (and this Court evidently found no such conflict, for it denied certiorari in *Robinson,* 351 U.S. 947); and in *Trost* v. *American Hawaiian SS Co.,*

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[11] The Muth Petition cites State cases to the effect that public service companies who hold themselves out to the public to carry passengers for hire and who are therefore bound to look after drunken passengers cannot say, when they fail in that duty, that the drunkenness of the passenger is to blame (PM 17). Mr. Atlass was not a public service company; he did not invite the public; he had assumed no duty to put drunks to bed and had delegated none. *Robinson* v. *Northeastern SS. Corp.,* 228 F. 2d 679 (CA 2); cert. den. 351 U. S. 947, *supra.*

324 F. 2d 225, cert. den. 376 U.S. 963 (1964), which approved *Robinson* (Op. 11a). (Cf. *Reply to the Petition for Rehearing,* pages 5-11)

The Petition of Muth refers to what it calls "subsidiary" matters on which it expressly says the Petition is *not* based, that it expressly admits were not passed on below (PM 3), concerning which it believes the lower courts "need guidance" (PM 18). Since the Petition explicitly advises the Court, and these Respondents, that it is not based on such matters, we take the Petition at its word. Accordingly, they need no other response. We crave leave to add only that the further (and correct) statement of the Petition that such matters were not passed on below (PM 3) would seem, also, to render them moot. They present no case or controversy for the exercise of this Court's appellate jurisdiction. Tender of debate as to whether or not a case will ever seek to come here in which a Court of Appeals has passed on these or, indeed, any matters in a way disclosing need for "guidance," is an invitation to abstract speculation, and (admittedly) is not a request for judicial review. Admittedly, no error with respect to any of such "subsidiary" matters occurred in the Court of Appeals.

In sum, the Court of Appeals did not hold any errors that the Petitioners attribute to it by their incorrect and elided statements and assumptions; its holding conflicts with no decision of this Court, nor with that of any other Court of Appeals.

The Petition of Muth argues (the Darr Petition does not) that this vessel was in violation of the requirement of a Coast Guard regulation requiring the life-saving equipment on vessels to be readily available (PM 2, 15). Neither Court below found any factual basis for the

argument and in view of the facts as found by the courts below, it would seem to be frivolous on the bare statement of the Petition. The regulation, which refers to life-saving equipment "on" vessels, is not shown to have been violated when two "life rings" were removed from the starboard rail when the vessel was placed on the drydock (PM 15). This vessel, incidentally, was not even required to carry "life rings" as life-saving equipment, and moreover there *were* two other life rings on the port rail (A. 48) (the maximum width of the yacht was only 19.2 feet) (FF 8) and in addition to these "readily available" life rings there were "readily available" life preservers (A. 48).

Moreover, upon the point of Petitioners' burden of proof of causation, Petitioner Muth (who raises the "life-saving equipment" question) concedes that Muth was *helpless,* and, as conceded in Petitioners' joint Petition for Rehearing, after it had been pointed out by the Court of Appeals, he was in a *stupor* (PM 16; P. Rhg. 10; Op. 7a). What possible good would it do to throw a life ring to a man who is in a helpless, drunken stupor—who could not avail of Smith's immediately extended hand, or dangled rope, or the watchman's ladder? The irresistable answer is confirmed by the authorities. (*Lee* v. *Pure Oil Company,* 218 F. 2d 801, 806 (CA 6), (Opinion by Mr. Justice Stewart); *Schlichter* v. *Port Arthur Towing Co.,* 288 F. 2d 801, 806 (CA 5).

We trust that what has been said sufficiently restores the reality of the situation to make it unnecessary further to extend this Reply.

Respectfully submitted,

EDWARD B. HAYES
Proctor for Respondents

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964 — APRIL SESSION, 1965

Nos. 14872-14873

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, deceased, and MOLLIE DARR, Administratrix of the Estate of Kurt Darr, deceased,
Claimants-Appellants,

v.

HARRIET M. ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,
Petitioners-Appellees and Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 30, 1965

Before KILEY, SWYGERT and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This proceeding in Admiralty was initiated by H. Leslie Atlass as the owner of the yacht "Sis," under the Limitation of Liability Act (46 U.S.C.A. Secs. 183-189) and Rules 51-54 of the Rules

of Practice in Admiralty and Maritime Cases, for exoneration from or, in the alternative, limitation of liability under the Jones Act (46 U.S.C.A. Sec. 688), for the death by drowning of two seamen, Clem Muth and Kurt Darr. Their representatives appeared as claimants and answered the petition. Subsequently, petitioner died and the executors of his estate were substituted as parties. (In this opinion we shall use the term "petitioner" rather than the names of his substituted parties.)

The District Court, after a lengthy trial without a jury, made extensive findings of fact and entered its conclusions of law. It concluded among other things that Atlass as an employer was liable for the deaths of the two seaman-employees which allegedly were proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. The Court also concluded that Muth and Darr were in part responsible for their deaths by reason of their own negligence. The Court, therefore, in summary held that petitioner was not entitled to exoneration but to a limitation of liability. In other words, it concluded there was negligence on the part of Atlass and contributory negligence on the part of Muth and Darr. Based on these conclusions an award of damages was made to the representative of each of claimants' estates.

From the Court's conclusion, embodied in its judgment, that petitioner was entitled to a limitation of liability, claimants appeal. From its conclusion, also embodied in its judgment, denying exoneration to petitioner, the latter cross-appeals.

While perhaps evident, we think it pertinent to note that if petitioner was entitled to exoneration, the issue as to limitation of liability is of no consequence. As the Court stated in The 84-H, 296 Fed. 427, 431 (C.A. 2):

> "The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist the second duty arises, which is to ascertain whether

the loss or damage was occasioned or incurred without the 'privity or knowledge' of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends."

To the same effect see *Rautbord* v. *Ehmann*, 190 F.2d 533, 537 (C.A. 7).

It appears appropriate in the beginning to make a brief summary of the pleadings. The petition among other things alleged that petitioner was the owner of a certain vessel of the United States known as the yacht "Sis," of the registered dimensions of 101.5 feet in length, 19.2 feet in breadth and 11.1 feet in depth, and of 131 gross and 89 net registered tonnage, with home port at Chicago, Illinois, and that at about 3 a.m. on October 26, 1956, while the "Sis" was within the Admiralty and Maritime jurisdiction of the United States, upon a certain drydock in the harbor of Detroit, Michigan, Clem Muth and Kurt Darr dropped or jumped into open water in a gap between the shipyard dock and the drydock, and drowned, while apparently returning to the yacht after spending the evening and early morning ashore.

The petition alleged that petitioner at all times exercised due diligence to make the vessel seaworthy and in all respects fit for the uses and purposes for which she was used; that the deaths of the said Muth and Darr were in nowise caused by the fault of the "Sis" or the persons in charge of her, or of petitioner, or any other person for whose fault or neglect petitioner might be responsible, but was the direct and immediate result of the fault of Muth and Darr, or the result of inevitable accident. The petition further alleged that Catherine Eleanor Muth as administratrix of the estate of Clem Muth had brought an action in the District Court against petitioner, claiming damages under the Jones Act (46 U.S.C.A. Sec. 688) in the amount of $250,000.00, and that petitioner had reason to believe that the personal representative of Kurt Darr, deceased, would commence an action against petitioner arising out of the same casualty.

The representatives of Muth and Darr (claimants) answered the petition, denying its material allegations. Muth's answer alleged that the death of Clem Muth was the immediate and proximate result of the negligence and careless acts of petitioner, his agents, servants, workmen and employees, occasioned and incurred with the fault, privity and knowledge of petitioner in carelessly permitting certain unsafe and dangerous conditions to prevail, in failing to provide safe and proper equipment on said vessel and in failing to take reasonable precautions to provide safe working conditions. Among the acts of negligence alleged were that petitioner "Negligently failed to provide a reasonably safe place to work, a safe means of ingress to and egress from the vessel, a gangplank or other safe means of leaving or boarding the vessel, adequate and proper illumination or light in the boarding area." (Other acts alleged appear to be embodied in those stated.)

Darr's answer was substantially the same as that of Muth, alleging that his death was caused by the negligence of petitioner, his agents and servants.

We shall first make an abbreviated statement of the facts as found by the District Court. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. Among those aboard were H. Leslie Atlass, vice president of CBS in charge of its Chicago office, the registered owner of the yacht; Muth and Darr; Frank E. Johnson, a purchasing agent employed by CBS; Raymond Mendel, acting first mate, employed by Atlass; Robert L. Smith, engineer of the yacht, employed by Atlass, and John Wasilas, a painter employed by CBS.

On October 22, 1956, after having been stranded in the St. Clair River for two days, the yacht proceeded under her own power to the Detroit Basin, Inc., a shipyard in the Detroit River. On October 23, she was there placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail until after Muth and Darr drowned.

The marine rail was 101′ long and 34′ wide. Along the north (or inshore) end, it was level with the dock and there was a place 10′ wide to walk onto the marine

rail bed without stepping across any gap. The yacht faced north in its position on the marine rail. On the eastern edge of the rail bed there were eight stanchions lined in a north-south row 13′ apart. The base of each stanchion was 15″ wide. Between the second and third, and also between the seventh and eighth, stanchions, from the north, there were steel crosspieces, each an inch in diameter, which crossed at a height of 5½′.

Immediately east of the eastern edge of the rail bed was a 32″ gap, below which there was water. At a point opposite the mid-point between the first and second stanchions (from the north) the water was 10 to 15′ deep. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway about 5′ wide which extended north and south for a distance of 65′. The level of this walkway was approximately 2″ below the rail bed. Preparatory to doing repair work on the yacht, scaffolding was erected by the shipyard company on the starboard side and at her bow. While the yacht was on the marine rail, toilet and cooking facilities on board could not be used. Members of the crew slept on the yacht, although Johnson and Darr occasionally stayed on shore in a hotel.

Two means of ingress and egress were available, (1) a ladder between the rail bed and the gangway on the starboard side slightly forward of midship, which necessitated stepping across the gap, and (2) the north end of the rail bed which abutted the dock where there was no gap (inshore route). Abutting the east edge of the walkway was a boat shed, the west wall of which was 24′ high, all glass except for a 4′ concrete base. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row.

While the yacht was on the marine rail or before, Atlass (petitioner) was jointed by his son, Atlass, Jr., and his daughter, Harriet. On the morning of October 24, Atlass and members of his family left for Chicago, leaving Johnson in charge. Atlass was not again present at the yacht until after the fatal occurrence.

We now come to the events of the night of October 25, which culminated in the fatalities at about 3 o'clock the following morning. At about 7 p.m. (after dark), Smith,

Mendel, Johnson, Wasilas, Muth and Darr went ashore to eat. The group left by the route they had most frequently taken, going from the vessel gangway down the ladder on the marine rail platform and then stepping across the gap to the walkway. This was at a point about 50′ from the north end of the walkway where there was an entrance from the boat shed. The party could have used the inshore route that night, where it was not necessary to cross any water. Everyone, including Muth and Darr, had used the inshore route on previous occasions, both in daylight and dark. Mendel returned to the ship at about 8 p.m., and Wasilas at about 9 p.m.

After dinner, Johnson, Muth and Darr went to a movie, then to a tavern known as Garvin's Bar where they found Smith and took turns ordering rounds of drinks. Muth was drinking straight whiskey with beer chasers. The bar stopped serving drinks at 2 a.m., and shortly thereafter Muth, Darr and Smith left, having been in the tavern three hours. A few minutes later they appeared at the boat shed through which they must pass in returning to the yacht. Gildersleeve, who had been the night watchman for thirteen years, unlocked the shed, turned on the overhead lights and permitted the three men to pass through. Darr was attempting to hold Muth as they went through the door, three or four steps ahead of Smith. As they emerged on the walkway, Darr was holding Muth up. They could have gone straight ahead and reached the rail bed by the inshore route, but instead they turned left and started down the walkway. About 15′ from the door of the boat shed, Muth fell into the gap between the walkway and the marine rail platform. Darr jumped in right behind him. They both drowned. (There was no proof that Muth was attempting to cross the gap at that unusual point.)

While the degree of intoxication of Muth and Darr at the time of the fatal occurrence is highly important, we need not burden this opinion with a detailed recital of the testimony bearing thereon. The Court found:

> "Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially

more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death."

This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into the gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other.

This perhaps is a pertinent point to make some observations as to the legal effect which the courts have given to the right of a seaman to recover under the Jones Act for maintenance and cure or for damages for injuries sustained, as are sought in the instant case. We find no Supreme Court case which has directly decided the point in an action for damages. However, *Farrell* v. *United States, et al.*, 336 U.S. 511, throws some light on the issue and it is pertinent because it contrasts the rights of the seaman under the two forms of action which are sometimes confused. In that case, the seaman sought to recover on both theories. The trial court sustained his action for maintenance and cure but dismissed it for damages. The Court of Appeals affirmed, *Farrell* v. *United States, et al.*, 167 F. 2d 781. The Supreme Court, in affirming the Court of Appeals, referred to a previous opinion and stated (page 515):

"In *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, the Court pointed out that logically and historically the duty of maintenance and cure derives from a seaman's dependence on his shop, not from his individual deserts, and arises from his disability, not from anyone's fault. We there refused to look to the personal nature of the seaman's activity at the moment of injury to determine his right to award. Aside from *gross misconduct* or insubordination, what the seaman is doing and why

and how he sustains injury does not affect his right to maintenance and cure, however *decisive it may be as to claims for indemnity or for damages for negligence.* [Italics supplied.]"

Thus, the Court indicates that gross misconduct, and we think the conduct of Muth and Darr must be so characterized, may be decisive in an action for damages based on negligence.

In *Wiper* v. *Erie Sand Steamship Co.*, 293 F. 2d 491, the Court affirmed the dismissal of a Jones Act case brought on the theory that the shipowner was negligent in permitting the seaman to go ashore when he was in a drunken condition. In rejecting the theory, the Court stated (page 493):

> "Whatever the 'parental' duty of a ship's captain may be, it surely does not require him to forcibly detain every crew member who has had a few drinks or who wishes to go ashore to do a bit of drinking for relaxation."

In *Schlichter* v. *Port Arthur Towing Company*, 288 F. 2d 801, in a damage action for the death of a seaman by drowning when he fell overboard, the Court sustained a judgment in favor of the vessel owner. The Court cited cases in support of the general rule that intoxication only mitigates damages but (page 803), "Of course, the result is different if the seaman's negligent intoxication is the sole cause of the injuries."

In *Barlow* v. *Pan Atlantic S.S. Corp., et al.*, 101 F. 2d 697, the Court affirmed a judgment denying the right of a seaman to recover maintenance and cure because of injuries sustained as a result of falling from a ladder while intoxicated.

In *The S.S. Berwindglen, Rawding* v. *Hooten*, 88 F. 2d 125, the Court sustained a judgment denying a claim for maintenance and cure for injuries sustained in attempting while intoxicated to climb a ladder leading to the dock.

Another case to be noted because of its similarity of facts is *Landy* v. *United States, et al.*, 101 F. Supp. 486. The action in Admiralty was brought by decedent's representative to recover damages under the Jones Act for a sea-

man's death occasioned by injuries sustained when he fell from a ladder while attempting to board a vessel. The owner was charged with negligence in failing to provide a safe means of ingress by reason of the defective condition of the ladder. The Court found that the seaman became intoxicated while ashore and returned to the vessel in that condition. Notwithstanding the Court's finding that the ladder was defective as alleged, it dismissed the claim on the basis that the seaman fell solely because he was intoxicated.

Prior to a consideration of the findings which form the basis for the Court's judgment against Atlass, we refer to an issue of importance, that is, whether Muth and Darr at the time of their deaths were engaged "in the course of their employment," a prerequisite to the right to maintain an action under the Jones Act. The issue is further in the case because of claimants' contention that Johnson and Smith, with knowledge of the intoxicated condition of Muth and Darr, were negligent in permitting them to return to the yacht and that such negligence was imputable to Atlass.

In *Braen* v. *Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 133, the Court stated:

> "Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders."

Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated.

Claimants attempt to meet this problem with the argument that the intoxicated condition of Muth was evident to Atlass' agents Johnson and Smith; that such agents were negligent in permitting his return to the ship; that they

were acting within the scope of their employment in so doing and that such negligence was imputable to Atlass. We think this argument is without merit. Pertinent to this point is the Court's finding:

> "Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages."

In the first place, there is no finding that Johnson had knowledge of the intoxicated condition of the two men. There is testimony that he went to the tavern with Muth and Darr, where they joined Smith and had some drinks. Later, time not disclosed, Johnson left the party and returned to his hotel. Thus, the most that is shown as to Johnson is that he knew they were in a tavern drinking intoxicating liquors. He did not accompany and had nothing to do with the return of Muth and Darr to the ship. On what theory he could be found negligent is not discernible.

Assuming without a finding, that Smith was negligent in accompanying and permitting Muth and Darr to return to the ship, such negligence could not be imputable to Atlass because Smith's activities, both affirmative and negative, were not within the scope of his employment. Certainly he was without authority and it was no part of his duties to protect drunk men in returning to the ship or to prevent them from so doing.

Claimants cite only one Federal case, *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473, affirmed 200 F. 2d 558 (C.A. 6), in support of their theory that Atlass is liable because of the negligence of his agents in taking Muth and Darr to the ship, a place of asserted danger. A comparison of the facts of that case with those here demonstrates that it is of no benefit to claimants. There, the ship owner knew that it was a regular procedure on his ship for a seaman to get drunk ashore and to be brought back to his ship by others of his crew and, with that knowledge, the owner had acquiesced in the practice. In fact, the ship owner em-

ployed a guard at the gate who was charged with the duty of refusing admission to seamen returning in an intoxicated condition. The guard placed another employee in charge of the drunken sailor for the purpose of escorting him to the ship. Instead of discharging his responsibility, the other employee, midway on the journey, abandoned the intoxicated sailor, who later was found drowned. The Court under those circumstances properly held, we think, that the ship owner was responsible for the negligence of its employees who were acting under specific directions and thus undoubtedly in the course of their employment.

Any doubt as to the holding in *Buckeye* is dispelled by *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679 (C.A. 2), in which an action for damages under the Jones Act was dismissed. The Court stated (page 681):

> "There [referring to Buckeye] the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment. In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner."

The Second Circuit, as late as 1963, in a Jones Act case approved of the decision in *Robinson* and reversed a judgment in favor of the claimant (a seaman). *Trost* v. *American Hawaiian Steamship Co.*, 324 F. 2d 225. As to *Robinson* the Court stated (page 228):

> "Although willing to assume that the assisting seaman was negligent and that the plaintiff's decedent was killed while in the course of *his* employment, this court

refused to hold the shipowner responsible. Rather, we held in *Robinson* that the particular act performed negligently, aiding an intoxicated seaman to return to his ship, was not within the scope of the negligent seaman's employment. [Citing cases.]"

Preliminary to a consideration of the findings relating to petitioner's negligence, it is pertinent to observe that there is no finding of negligence on the part of any person except Muth and Darr. As to Atlass, the Court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings."

Taking this finding at its face value, it would appear to exonerate Atlass from all responsibility for the asserted negligent conditions existing at the time of the occurrence. It may be that the Court while finding that Atlass was not personally responsible thought he was liable because of negligence of others imputable to him. If such be the thinking, there was, as noted, no finding that Johnson, left in charge of the ship when Atlass returned to Chicago, was negligent, and there is no finding that any other employee or agent of Atlass was negligent. It seems that if petitioner is to be held liable on an imputable negligence theory, he is entitled to know by whose negligence and of what it consisted.

In considering the findings as they concern the issue of petitioner's negligence, we recognize, without the citation of authority, two well established principles of law, (1) that an employer has a duty to provide seamen in his employment with safe and seaworthy appliances and a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel, and (2) that the burden of proof under the Jones Act to show negligence causally relating to the accident is on the seaman or his representative. Negligence is not presumed but must be affirmatively proved.

The findings as they relate to negligence, other than those referred to, are:

> "No. 27. Access to the rail bed from shore was hazardous, particularly at night, whether it was ac-

complished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap."

"No. 39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient."

As already noted, there is no finding or conclusion by the Court that the condition portrayed by these findings was due to the fault or negligence of Atlass, Johnson or any other employee; in fact, the Court found that Atlass was not personally responsible. The stanchions and crossbars referred to were a part of the permanent rail bed structure. The shipyard company constructed the scaffolding preparatory to doing repair work on the yacht, and it was also responsible for the ropes and planks on the rail bed.

Assuming, absent a finding, that there was negligence on the part of petitioner's employees in permitting these so-called obstructions on the rail bed (west) side of the gap, they could not have contributed in whole or in part to the tragedy because Muth and Darr were on the walkway on the opposite (east) side of the gap when they fell or jumped into the water.

That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support. The only testimony we find in this respect is that there were some planks on the walkway, and the photographs offered by claimants show that they were piled in order in their usual place on the east side of the walkway, against the wall of the boat shed. These

planks were a part of the facilities furnished by the shipyard company for use by seamen if needed in bridging the gap between the walkway and the rail bed. They were never used by any of petitioner's seamen, including Muth and Darr, because their use was not thought necessary. In any event, the presence of these planks bore no relation to the occurrence. Muth and Darr made no attempt to return to the ship along the north side of the rail bed where there was no gap. When they left the boat shed accompanied by Smith, they turned left and proceeded south along the walkway, headed for the point across the gap from the ladder. As the Court found, this was the route most frequently taken from shore to the rail bed. There is no proof and no claim that there was any obstacle on the walkway which interfered in any manner with Muth and Darr as they proceeded along the walk on the east side of the gap.

The Court's finding that "the lighting of the walkway, • • • at the time of the drowning was insufficient" is of a conclusory nature, based upon the opinion testimony of claimants' expert witnesses. Petitioner's expert witness expressed his opinion that the illumination on the walk was sufficient for the purpose of its use. These witnesses seemed to be in substantial agreement that the illumination was equal to that furnished to pedestrians on Chicago streets. The proof by witnesses who had personal knowledge of the condition is overwhelming that the illumination was sufficient for normal and ordinary use. No amount of illumination could have saved Muth and Darr from their own folly. That could have been accomplished only by placing a cover over the gap from end to end.

Smith, the only eye witness, testified that the point of the occurrence was about midway between the entrance to the walkway and the ladder, which had been in the same place since the yacht had been on the rail bed. He stated that "the lighting was good enough you could see to get around in out there because it was shining right through the glass on the platform out here and the walkway"; that he had been with Muth and Darr on previous occasions when they were crossing the gap between the walkway and the rail bed, and that they had no difficulty in seeing. Milton Pinkstaff testified that he had been employed by the shipyard as a carpenter for some fourteen years, that the rail bed had remained in the same

position during that time and that the gap was easy to step across. He arrived at the scene of the occurrence at about 3 a.m., and stated that there were no hoses, ropes or debris on the walkway, that the lights in the boathouse were on and that the lighting conditions were very good. Morton Gildersleeve testified that he had been employed by the Detroit Basin as a night watchman from 1948 to 1961, that when on duty he stepped across the gap two or three times each night and that during his employment no person other than Muth and Darr had fallen into the gap. He observed no debris of any kind on the walkway and stated that the lighting conditions were good. All members of the crew, including Muth and Darr, in daytime and at night, had stepped over the gap many times in leaving and returning to the yacht. Atlass' daughter testified that with her tight skirt and high heeled shoes it was an easy step. Raymond Mendel, a witness for claimants, testified, "There wasn't too much light that did come through them windows. It was like early evening, just between dark and evening, you know dusk." He admitted that flashlights were available on the yacht but were rarely needed. In a pre-trial statement, the witness said, "That was an easy step and I am sure everybody who was on the yacht and who I have mentioned, including Mr. Atlass' daughter, Sis, who was a girl in her teens, stepped across that gap without any trouble. I know that I saw Muth and Darr go onto the platform in both ways I have described."

The Court made no finding that insufficient lighting of the walkway was due to the negligence of Atlass or any of his employees or that it was the cause, in whole or in part, for the fatal occurrence. We think there is no basis for a reasonable inference that it was. The misconduct of claimants' decedents was solely responsible for their unfortunate demise.

In *Jackson* v. *Pittsburgh S. S. Co.*, 131 F.2d 668, the Court affirmed a judgment denying to a seaman a claim for damages under the Jones Act. It was there alleged that the boat owner was negligent in his failure to furnish a ladder or any other means of ingress and egress. The seaman desired to go ashore, jumped from the deck of the vessel to the dock, a distance of about six feet and sustained the injuries complained of. The Court assumed

that the owner was negligent in failing to provide a ladder but denied recovery because the misconduct of the seaman was the sole cause of his injuries. In doing so the Court stated (page 670):

> "When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. [Citing cases.]"

See also *Meintsma* v. *United States*, 164 F.2d 976, 977.

In conclusion, it seems in order to make a brief statement of the undisputed facts relative to the conduct of Muth and Darr after they were in the water. Smith who was unable to swim stepped to the gap, knelt down and directed his flashlight therein. He saw Darr trying to help Muth, but Muth was throwing his arms around and fighting Darr. Smith lay on the walkway with his left hand down into the gap about three or four feet. He braced himself with his right hand on the rail platform. Smith shouted several times for them to grab hold of his hand, and if either had reached up he could have done so, but neither did. Gildersleeve, the night watchman, was at the scene in a few minutes and saw Smith dangling a rope, trying to get Muth to grab it, holding it right in front of Muth's face between his outstretched arms. The rope actually came in contact with Muth's head and body but he did not take hold of it. Gildersleeve placed a ladder in the water but Muth would not take hold.

Mendel and Wasilas were asleep on the boat when they heard cries for help. Both came to the platform and jumped into the water in an effort to save Muth and Darr. At that time the latter had disappeared. They tied a tight line around Muth's body and gave the end of it to Smith. They then swam underneath the dock into the boat shed and climbed out of the water. Smith held Muth out of the water until their return. When they attempted to pull him from the water, he slipped through the loop and was not seen again.

Muth and Darr were middle-aged men, healthy and vigorous, and both were swimmers. The conclusion is inescapable that their total inability to aid themselves or each other after they were in the water was the result of their intoxicated condition, induced by their own voluntary acts. In contrast, Mendel and Wasilas, who were sober, were in the water for some ten minutes and had no difficulty in swimming to safety.

In our judgment, and we so hold, the deaths of Muth and Darr were the result solely of their own gross misconduct. It follows that the Court erred in its refusal to exonerate Atlass of all liability for loss or damage occasioned thereby. In view of this conclusion other issues discussed in the briefs need not be considered.

The judgment is reversed and the cause remanded for such further proceedings as are not inconsistent with this holding.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

194 FINDINGS OF FACT AND CONCLUSIONS OF LAW

(entered June 12, 1964)

This cause having come on for trial before this Court and memoranda having been submitted by all parties hereto, and being fully advised the Court now enters the following findings of fact and conclusions of law:

Findings of Fact

1. On October 26, 1956, at about 2:45 a.m., Clem Muth and Kurt Darr died from asphyxia by drowning in the Detroit River, Detroit, Michigan.

2. Muth was born on May 3, 1915. He and claimant Catherine E. Muth (who was born March 27, 1919) were married on November 25, 1944. Three children were born to them: Clem William, born November 29, 1947, Patricia, born December 27, 1951, and Phyllis, born February 9, 1954.

3. At the time of his death, Muth was employed by The Columbia Broadcasting System, Inc. (hereinafter re-
105 ferred to as "CBS"), in Chicago as a maintenance painter. He had been so employed for 4½ years. He was the president of Local 180, Painters District Council No. 14.

4. Darr was born on December 30, 1909. He and claimant Mollie Darr (who was born November 7, 1915) were married on May 4, 1935. Three children were born to them: Leighton, born June 16, 1938, Raymond, born December 16, 1943, and Janice, born February 28, 1946.

5. At the time of his death, Darr was employed by CBS in Chicago as an electronic technician. He had been employed by CBS and its predecessor corporation for 24 years. He was a member of the International Brotherhood of Electrical Workers.

6. Immediately prior to their deaths, neither Muth nor Darr was suffering from any disease or physical handicap apparent to a layman. Both knew how to swim.

7. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. The following persons, among others, were aboard at that time:

(a) H. Leslie Atlass, vice president of CBS in charge of its Chicago office, who was the registered owner of the "Sis" from the time he purchased her in 1947 until his death in 1960;

(b) Muth and Darr;

106 (c) Frank E. Johnson, a purchasing agent employed by CBS in Chicago;

(d) Raymond Mendel, Acting First Mate and Assistant Engineer of the "Sis," employed by Atlass;

(e) Robert L. Smith, engineer of the "Sis," employed by Atlass;

(f) John Wasilas, a painter employed by CBS in Chicago.

8. The "Sis" was a licensed pleasure yacht with a registered length of 101.5 feet, width of 19.2 feet and depth of 11.1 feet. Her gross and net tonnage were, respectively, 131.64 and 89.00 tons. She had two 16 cylinder pancake-type engines with a total of 2400 registered horsepower. Sleeping accommodations on board included a master stateroom, six bunks in the crew's quarters and officers' quarters which slept two.

9. At various times prior to October, 1956, CBS employees Muth, Darr and Wasilas had performed work aboard the "Sis" including painting, adjusting electronic equipment and handling lines on short Lake Michigan runs.

10. Shortly before the "Sis" sailed for Florida, Muth and Wasilas had applied one coat of paint to the hull, re-

sanded and revarnished the sides of the cabins and wheelhouse and painted the top deck. An additional two
107 coats of paint were to be applied to the hull when the yacht docked in Florida.

11. On the day that the "Sis" was to sail for Florida, Johnson, on Atlass' behalf, told Muth, Darr and Wasilas that extra deck hands were needed for the voyage, and he asked them to come along to work. They agreed to do so.

12. As the trip commenced, Muth, Darr and Wasilas assisted with the folding of the lines. Shortly thereafter, Muth, Darr and Mendel were instructed by Atlass (or, on his behalf, by Johnson) to install a watertight manhole cover near the yacht's bow. They attempted unsuccessfully to do so while the "Sis" was heading into a strong wind and high waves; later the vessel was turned and slowed, and the job was completed.

13. The following afternoon, Muth, Darr, Wasilas and Mendel cleaned, mopped and straightened up the deck.

14. At various times during the voyage, Muth, Darr and Wasilas kept watch. In addition, Darr steered some of the time.

15. On October 20, the yacht stranded in the St. Clair River. Everyone aboard, including Muth and Darr, assisted in efforts to dislodge her. She finally was freed on October 22 and proceeded under her own power to the Detroit
108 Basin, Inc., on the Detroit River.

16. On October 23, the yacht was placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail from that time until after Muth and Darr drowned.

17. While she was on the marine rail, ingress to and egress from the yacht could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of midships.

18. While the "Sis" was on the marine rail, toilet and cooking facilities on board could not be used. The crew continued, nevertheless, to sleep on board. Muth, Mendel, Smith and Wasilas, among others, slept in the crew's quarters as they had each night after the vessel left Chicago. Johnson, who with Darr had been sleeping in the officers' quarters, stayed in a hotel after October 23; Darr slept in a hotel one of the nights October 23-24 and in the officers' quarters the other night. Atlass, who had slept in the master stateroom, moved to a hotel on October 23 and returned to Chicago on October 24.

19. When Atlass left Detroit on October 24, he told Johnson that he was in charge and that the yacht was
109 to be repaired and readied to continue to Florida. Thereafter, Johnson gave directions and orders and paid for meals eaten by the men.

20. While the yacht was on the marine rail, Muth and Wasilas painted the mess hall and the galley, and Mendel weaved lines and ropes.

21. On the marine rail, the "Sis" faced north. Scaffolding was erected along the yacht's starboard side and at her bow. Near the edge of the rail bed, east of the starboard side scaffolding, there were eight stanchions lined in a north-south row, 13 feet apart. The base of each such stanchion was 15 inches wide. Between the second and third and also between the seventh and eighth stanchions (from the north), there were steel cross pieces, each an inch in diameter, which crossed at a height of five and one-half feet.

22. Immediately east of the eastern edge of the rail bed was a 32 inch gap below which was water. At a point opposite the midpoint between the first and second stanchions (from the north), the water was 10-15 feet deep.

23. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway the northernmost 65

foot length of which was about five feet wide. The level of this walkway was approximately two inches below that of the rail bed.

110 24. Abutting the east edge of this walkway was a boat shed, 24 feet high. The shed's west wall consisted of a concrete base, four feet high, and panes of glass above the base.

25. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row. These rows were located 15 feet and 36 feet, respectively east of the shed's west wall. The northernmost and southernmost fixtures in each row was about 16 feet from the north and south ends, respectively, of the shed. Each fixture was 24 feet above the level of the dock, and within each row each fixture was 16 feet from the next. Each fixture housed a 200 watt incandescent bulb with an RLM dome-type reflector.

26. The marine rail bed was 101 feet long and 34 feet wide. Along its north (or inshore) end, for 12 feet west from its northeast edge, there was a 19 inch gap north of which was a dock. This dock abutted the north end of the rail bed without any gap for 10 feet west of that portion of the north edge of the rail bed which was separated by a gap from the dock. Along the entire north edge, the water was 3-4 feet deep.

111 27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was clut-

tered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap.

28. Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages.

29. Muth, Darr and Smith left Garvin's Bar together. Muth soon commenced staggering and had to be assisted by the other two. At one point, Muth slipped and fell into the street and had to be aided to his feet.

112 30. The three men proceeded to the Detroit Yacht Basin where the outside door to the boat shed was locked. They rang for the night watchman who came, turned on the overhead lights in the shed and unlocked the door to let them pass through. As they did so, Muth was staggering and Darr, on Muth's left, was assisting him. Smith followed, a few steps behind.

31. The three men turned south down the walkway. Opposite a point between the first and second stanchions, about 15 feet south of the northern terminus of the walkway, Muth fell into the gap between the walkway and the rail bed. Immediately, Darr jumped in to try to save Muth.

32. Wasilas and Mendel, both asleep on the yacht, were awakened by Smith's cries for help. By the time they reached the walkway where Smith, who was unable to swim, was shining a flashlight into the water, Darr had disappeared from sight. Wasilas and Mendel jumped into

the water to assist Muth, but they were unable to rescue him.

33. At the time of the drowning, no member of the crew had been discharged either by Atlass or his authorized agent.

34. Muth and Darr had a more-or-less permenant connection with the relevant voyage of the "Sis".

113 35. The services which Muth and Darr performed on the "Sis" were maritime in character.

36. At the time of the drawing, the "Sis" was a vessel in navigation.

37. Minimum levels of lighting recommended by the Illuminating Engineering Society are the following: general areas of shipyards, 5 foot candles; freight and passenger piers, 20 foot candles; inactive pedestrian and/or conveyor entrances normally locked and infrequently used, 1 foot candle.

38. At the time of the drowning, illumination on the walkway, dock and rail bed was less than one foot candle.

39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient.

40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death.

114 41. Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings.

42. On March 15, 1961, the "Sis" was sold by Atlass' estate for $30,000. In 1952, Atlass had asked $85,000 for the yacht. In 1954, he had reduced the price to $75,000, and in 1956, he again offered to sell her for this amount. In 1956, the replacement cost of the "Sis" was more than $100,000. In 1962 and 1963, several qualified marine appraisers retained by the petitioner expressed opinions as to the fair market value of the "Sis" in 1956 which ranged between $25,000 and $35,000.

43. The fair market value of the "Sis" on October 26, 1956, was $50,000.

44. On March 22, 1957, claimant Catherine Muth filed in this Court civil action No. 57 C 528 stating a claim against Atlass under the Jones Act, 46 U.S.C. § 688. On April 22, 1957, the instant proceeding was commenced by Atlass, filing a petition for limitation of or exoneration from liability. On October 23, 1959, claimant Mollie Darr filed civil action No. 59 C 1692 against Atlass and CBS, under the Jones Act. Shortly thereafter, claimant Muth filed civil action No. 59 C 1697 against CBS, under the Jones Act. Atlass died on November 18, 1960, and
115 his executors were substituted as the petitioners in the instant action. Upon the execution of a covenant not to sue, both claimants settled their suits against CBS.

45. On October 26, 1956, Muth and claimant Catherine Muth had a joint life expectancy of 24.63 years; Darr and claimant Mollie Darr had a joint life expectancy of 21.04 years.

46. If they had survived, Muth and Darr both would have retired upon reaching the age of 65. On October 26, 1956, therefore, Muth had a work expectancy of 23 years,

6 months, and Darr had a work expectancy of 18 years, 2 months.

47. Muth and Darr each spent 25% of his income on himself.

48. Claimants Catherine Muth and Mollie Darr each received $12,500.00 from CBS in exchange for a covenant not to sue.

49. Muth and Darr each would have received biennial wage increases of 4% from the expiration of the present contract until the date of their retirement.